# In the Supreme Court of the United States

OCTOBER TERM, 1955

---

No. 905

LEONARD J. SHAFITZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1a) is reported at 230 F. 2d 606.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1956 (Pet. App. 1a). A petition for a rehearing was denied on March 30, 1956. The petition for a writ of certiorari was filed on April 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

## STATUTE AND RULE INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 7(c) of the Federal Rules of Criminal Procedure provides:

> The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

* * * It need not contain * * * any other matter not necessary to such statement.

### QUESTIONS PRESENTED

1. Whether an indictment under the mail fraud statute (18 U.S.C. 1341) was fatally defective in omitting the word "knowingly" in charging that petitioner "placed or caused to be placed" in the mails certain fraudulent invoices.

2. Whether the prosecutor's statement that from the evidence he believed in petitioner's guilt constituted reversible error.

### STATEMENT

Petitioner and one Lowen were charged in a ten-count indictment in the United States District Court for the Western District of Kentucky with violations of 18 U.S.C. 1341 (*supra*, p. 2), in that they devised a scheme to defraud Reynolds Metal Company (hereinafter referred to as Reynolds) by knowingly making false invoices to the effect that Cinema Scores Company, set up by the two defendants, had performed certain services for Reynolds in connection with motion picture production for which Reynolds was indebted to Cinema Scores. In each count it was alleged that on the particular date in 1952 involved, petitioner and Lowen, for the purpose of executing the scheme, "placed or caused to be placed in an authorized depository for mail matter, at Louisville, Kentucky, a letter addressed to Reynolds Metal Company, Richmond, Virginia, containing the aforesaid invoice of Cinema Scores Company * * *

for the purpose of securing payment thereof, to be sent or delivered by the Post Office Establishment of the United States" (R. 3a-8a).[1] Petitioner was found guilty by a jury, and on appeal his conviction was unanimously affirmed (Pet. 1a).

The evidence adduced at the trial may be summarized briefly as follows:

Petitioner was the director of the Reynolds Motion Picture Department for the preparation of commercial films. His office was at Louisville, Kentucky, where he also had a business of his own called Cinema Products Company (R. 10a, 13a, 35b). Lowen, who lived in Detroit, was registered in New York and Detroit to do business under the name Cinema Scores Company (R. 2b-4b).

Lowen testified that the Cinema Scores Company invoices submitted to Reynolds were prepared by petitioner in Detroit at Lowen's home. Petitioner would discuss with Lowen the various films he was working on, and prepare invoices for the work he felt was completed or nearing completion (R. 61b-62b).

At Louisville, petitioner would make a requisition for the work to be done and approve the invoice, which would go to a clerk, Mrs. Ryles (R. 11a, 14a, 15a, 85b-87b, 94b, 103b-104b). The invoice would be approved for payment by a supervisor, and Mrs. Ryles would prepare transmittal papers, which were picked up by an employee from the

[1] The record is composed in part of the Appellant's Appendix, paginated 1a to 86a, inclusive, and the Appellee's Appendix, paginated 1b to 109b, inclusive.

mailing department and mailed to the Richmond office for payment (R. 14a-18a, 84b, 88b-93b, 97b-102b). At Richmond, a check would be drawn and mailed to the Cinema Scores Company in New York (R. 48a, 51a-53a, 105b, 107b). Such checks were indorsed for deposit to the "account of Cinema Scores Co., Leslie Lowen" (R. 105b, 107b).

The total amount of checks received from Reynolds by Cinema Scores Company between 1950 and 1953 was $22,247 (R. 65b). Cinema Scores Company had no facilities for scoring films (R. 54b, 82b). Lowen and petitioner testified that when Reynolds forwarded a requisition to Cinema Scores for certain services, they performed consultative and research services without any necessity for physical assets (R. 54b-55b, 82b-83b). Nearly all of the alleged services on the invoices had already been performed by legitimate companies, and none by Cinema Scores Company (R. 7b-13b, 22b-34b, 43b-49b).

Lowen testified that the only reason for the New York address of Cinema Scores Company was to receive checks from Reynolds (R. 54b). He sent part of the proceeds from the Reynolds checks to petitioner, after petitioner's Cinema Products Company billed Cinema Scores for services (R. 56b-59b).

At the close of the government's case and at the conclusion of the trial, petitioner made a motion for acquittal. Among the reasons assigned were that there was no evidence that either defendant placed invoices in any post office, and that the in-

dictment was fatally defective in failing to charge that the defendants knowingly caused the invoices to be mailed (R.1a, 70a).

In closing argument, the prosecutor, Mr. Walker, attacked petitioner's credibility. He stated that petitioner knew that the invoices would be mailed to Richmond, and that checks in payment of the invoices would go through the mails (R. 77a-79a). The following then occurred (R. 79a):

> Mr. WALKER: * * * There's no question in my mind about the guilt of either one of these men. I say to you that they are guilty beyond all doubt. There's no guilt beyond a reasonable doubt; they are guilty beyond all doubt. All doubt. All doubt.
>
> Mr. FIELD: If the Court please, I'd like to record an objection to the statement just made by the Government attorney.
>
> The COURT: All right.
>
> Mr. WALKER: And I say from the evidence that was presented here that was my deduction, and I do not believe that twelve intelligent women and men will be so gullible that they will believe what these defendants have said. I do not believe that you, in your own good conscience, would say these men were not guilty.
>
> Now, I could talk about more evidence in this case, more of my own deductions; but I feel that you now know as much about this case as anyone knows, and I ask you in good conscience, and from the bottom of my heart, with all my sincerity and honesty that I ever had to

render a verdict quickly and swiftly of guilty as to both of these defendants.

Thank you.

The court charged the jury as follows:

> There are two principal questions for you members of the jury to ask yourselves; first * * * whether or not these defendants devised a scheme to defraud Reynolds Metal Company as is charged in the first paragraph of each of the separate counts of this indictment; and second, * * * did these defendants use or cause the mails of the United States to be used in the furtherance of this scheme to defraud. * * * (R. 81a).
>
> * * * * *
>
> Now it is not necessary * * * that the scheme to defraud was intended to be executed by the use of the mails. It is enough that the use of the mails could reasonably be contemplated and would follow in the ordinary course of business. Also, if the scheme is one which reasonably contemplated the use of the mails, it is not necessary for the defendants to do the mailing. It is sufficient if their acts caused the use of the mails by others in the usual course of business (R. 82a-83a).

Defense counsel requested an instruction that the defendants must have "knowingly" caused the mails to be used. In answer to this the court said:

"Well, I think my instructions regarding the mailing or causing to be mailed is from the most recent case of the United States Supreme Court [*Pereira* v. *United States*, 347 U.S. 1], so I am going to adhere to that" (R. 84a-85a).

ARGUMENT

1. Petitioner's contention that the indictment was fatally defective, in that it did not use the word "knowingly" in charging that he "placed or caused to be placed" in the mails the invoices involved, is without merit.

The concept of causation embraces the element of knowledge. The use of the mails is "caused" if, as the trial judge charged, such use is within the reasonable contemplation of the scheme, *Pereira* v. *United States*, 347 U.S. 1, 12; *Kann* v. *United States*, 323 U.S. 88, 94, *i.e.*, if the schemer has reason to know that the mails will be used in furtherance of the scheme. There was thus no reason to allege that the mailing was knowingly caused. The indictment did allege that the fraud was knowingly perpetrated since petitioner and Lowen were charged with devising the fraudulent scheme to represent that Cinema Scores Company had performed services for Reynolds, "well *knowing* at the time and place that the pretenses and representation, would be false when made" (emphasis added; R. 3a).[2] See *Webb* v. *United States*,

[2] That fact serves to distinguish the cases relied upon by petitioner where the offense itself was not alleged to have been knowingly done. *Griffin* v. *United States*, 173 F. 2d 909 (C.A.

191 F. 2d 512, 514-515 (C.A. 10); *Kreuter* v. *United States*, 218 F. 2d 532, 533-534 (C.A. 5), certiorari denied, 349 U.S. 932; and *United States v. Crummer*, 151 F. 2d 958, 963 (C.A. 10), certiorari denied, 327 U.S. 785, in which mail fraud indictments, not using the word "knowingly", were upheld.

Modern rules of pleading do not require that evidentiary facts be pleaded in detail or with hair-splitting precision. It suffices that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c), F. R. Crim. P., *supra*, pp. 2-3), as this indictment did. The various counts apprised petitioner and his co-defendant "of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense." *United States* v. *Debrow*, 346 U.S. 374, 378.

Petitioner has shown no prejudice flowing from omission of the word "knowingly" from the indictment. There was evidence that invoices representing accounts payable by Reynolds at Louisville were paid by its disbursing office at Richmond (R. 12a, 48a, 51a-52a). On petitioner's cross-examination, moreover, it was shown that on several occasions he had interdepartmental correspondence with Reynolds employees at the disbursing office in Richmond, so that he had knowledge that the disbursement office was located there (R. 72b-77b,

---

6), involving a selective service violation, and *United States* v. *Max*, 156 F. 2d 13 (C.A. 3), involving a violation of an O.P.A. order.

109b). Petitioner also testified that he expected the checks to be paid to Cinema Scores Company from "wherever the Disbursing Office of the Reynolds Metals Company would be, Louisville, Richmond, or wherever it may be" (R. 79b). There was, therefore, ample evidence from which the jury could infer that petitioner had knowingly caused the mailing of the invoices.

2. There is no substance to petitioner's contention that the prosecutor's closing argument, in expressing an opinion as to petitioner's guilt and asking for the return of a guilty verdict "quickly and swiftly" (Statement, *supra*, pp. 6-7), was prejudicially improper (Pet. 12-13).

A prosecutor may ask for a conviction, and exhort the jury to draw all reasonable inferences and deductions from the evidence. It is not misconduct for him to express individual belief as to an accused's guilt if this is based solely upon the evidence introduced, and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, warranting that belief. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C.A. 6); *United States* v. *Battiato*, 204 F. 2d 717, 719 (C.A. 7), certiorari denied, 346 U.S. 871; *United States* v. *Holt*, 108 F. 2d 365, 370 (C.A. 7), certiorari denied, 309 U.S. 672; *Gridley* v. *United States*, 44 F. 2d 716, 739 (C.A. 6), certiorari denied, 283 U.S. 827.

Here the prosecutor based his statement on the evidence. He had attacked petitioner's credibility by showing the untenability of his testimony that

he did not even know there was a Reynolds disbursing office in Richmond, when all his salary checks had come from there; and by showing the implausibility of petitioner's original denial (later retracted) that he knew anything of a disbursing officer named Grubbs at Richmond (R. 78a). Shortly thereafter, the prosecutor made the remarks now claimed to have been objectionable (R. 79a). He stated that his belief as to petitioner's guilt was his own "deduction" from the evidence as presented; it was not a personal opinion based upon evidence known only to him, but not introduced at the trial. In this setting it was no more prejudicial than the facts themselves.

## CONCLUSION

The decision of the court below is in accordance with established legal principles, and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
WARREN OLNEY III,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

MAY 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 594259 1492